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NO. 80-702

In The

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,

Appellant,

vs.

STATE OF NEW MEXICO, et al.,

Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEES

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COUNTERSTATEMENT OF QUESTION PRESENTED

We believe that the question presented is properly stated as follows: Did the lower court properly conclude, under the facts and circumstances of this case, that the legal incidences of the New Mexico gross receipts taxes in question were imposed on the contractors in question as private contractors rather than as agencies of instrumentalities of the United States; and that therefore, under controlling precedent, these contractors were not exempt from the taxes in question under the doctrine of implied governmental immunity?

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INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission in support of the Appellees' position. Both parties to this proceeding have consented to the filing of this brief.[1]

[1]Originals of the consent letters have been filed with the Clerk of the Court.

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states as full members, including New Mexico, by the District of Columbia and by 12 states as associate members.[2]

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatability in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[3]

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[2]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia.

[3]The constitutionality of the Compact was upheld by the United States Supreme Court in *U. S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U. S. 452 (1978), affirming 417 F. Supp. 795 (S. D. N. Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer."

In fulfillment of these objectives, the Commission and its member states have a vital interest in assuring that all businesses carrying on activities within their jurisdictions, and benefiting from governmental services and functions, bear their share of the public cost. This is not just a question of revenues, it is a question of tax justice as well.

The present case raises matters of vital concern to them. The Commission member states have a vital interest in preventing federal involvement in the business activities of private corporations from spilling over indiscriminately into state tax policies affecting the taxation of property or activities within their borders.

While we do not question the need for and the constitutional significance of implied inter-governmental tax immunity, we seriously doubt whether it should turn on the interpretation of vague and conflicting language in United States contracts with private corporations or that it should be extended to the proprietary interests. We are thus unalterably opposed to the expansion of implied government tax immunity by contractual penmanship where the consequence is not to protect vital interests of the United States Government from improper encroachment by the taxing powers of the states; but, rather, to shift national tax costs to particular geographical locations where private corporations carry on substantial business activities on behalf of the United States.

The underlying issue in this cause is whether the state of New Mexico and particular political subdivisions of that state are to bear the costs of the benefits and privileges granted the private contractors in the case at bar or whether such costs are to be borne by the United States

as a whole. For this reason, we do not believe that implied governmental immunity should be extended to exempt from non-discriminatory state taxes any private corporations which are not, in law and fact, agencies or instrumentalities of the United States. Thus, unless this Court should find in the instant case that the subsidiary and affiliated corporations of Western Electric and Santa Fe Industries, Inc. are in fact and law agencies and instrumentalities of the United States Government for all purposes, no inter-governmental tax immunity should be attributable to any of their activities.

We are particularly troubled by the position of the United States in this case that the characterization of private corporations as "procurement agents" of the United States in government contracts confers on private corporations the status of agents of the United States for implied governmental immunity tax purposes.

In conformity with the foregoing concerns, the purpose of this brief is to demonstrate to this Court why we believe the position of the United States is not supported by this Court's controlling inter-governmental tax immunity cases and is otherwise an improper extension of the doctrine of implied governmental immunity.

As to the later, we do not believe that contractual penmanship should be allowed to extend governmental tax immunity to proprietary governmental activities, particularly when these activities are conducted by private corporations which are not so assimilated as to constitute an instrumentality of the federal government.

SUMMARY OF ARGUMENT

United States v. Boyd, 378 U. S. 39 (1964) and the cases relied on therein are dispositive of this case. The legal incidences of the taxes in question and the contractual relationship between the United States and the contractors in question are not distinguishable for constitutional tax immunity purposes from the legal incidence of the tax and the contracts in the *Boyd* case. In both *Boyd* and the instant case, the legal incidences of the taxes were on the contractors, as private corporations, which were not assimilated as agencies or instrumentalities of the United States. *Boyd* and the case at bar both involved standard Atomic Energy Commission (now DOE) management contracts which were developed to facilitate the Atomic Energy Commission's substantial reliance on private industry in the construction and the management of large research and development facilities (Appellant's Brief, pp. 3, 16; *Boyd, supra*).

The reliance of the United States on *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954) is misplaced. Unlike the case at bar and *Boyd, Kern-Limerick* did not involve the question of implied inter-governmental tax immunity under a standard Atomic Energy Commission management contract which involved ongoing business relationships between the United States and the contractors. Rather, *Kern-Limerick* involved construction contracts between the Navy and the contractors for the construction of an ammunition dump which was to be maintained and operated by the Navy. The only question in *Kern-Limerick* was whether or not the purchases of the tangible property there involved were purchases by the Navy under the Armed

Services Procurement Act of 1947 (62 Stat. 21, 42 U. S. C. (Supp. V § 157 et seq.)); see 347 U. S. at 112-113. Inasmuch as the purchases in *Kern-Limerick*, pursuant to express contract provisions and by specific purchase orders, obligated the United States to pay the vendors for the purchases, *Kern-Limerick* held that purchases made in accordance with these express provisions were purchases by the United States and thus exempt from the Arkansas gross receipts tax under the doctrine of implied governmental immunity. In *Kern-Limerick*, this governmental immunity was not destroyed by the Navy using contractors as purchasing agents in conformity with the requirements of the Armed Services Procurement Act.

Unlike the contractors in *Kern-Limerick*, the contractors here received the gross receipts in question from the United States as reimbursements for their own obligations which were not incurred in conformity with the statutes and regulations applicable to United States Procurement agents. This is particularly evident in regard to their own operating expenses, including employee salaries and fringe benefits, which involved no purchasing relationships with third parties.

The advance funding arrangement relied upon by the United States does not negate this fact. Unless the contractors in question are so assimilated as to constitute instrumentalities of the United States, it is totally illogical to conclude that the payment of their day-to-day operating expenses, including the procurement of supplies for this purpose, as well as payment of employee salaries, constitute the payment of obligations of the United States.

Since it is conceded that the contractors in question are not United States instrumentalities, but are independ-

ent, private corporations that purchased on their own account, *Boyd* and the cases relied on therein, including *Esso Standard Oil Co. v. Evans*, 345 U. S. 495 (1953); *Alabama v. King & Boozer*, 314 U. S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); and *United States v. Township of Muskegon*, 355 U. S. 484 (1958) and not *Kern-Limerick, supra*, control disposition of this case. Furthermore, if *Kern-Limerick* conflicts with the decision below, it should be overruled because it would place form over substance and extend implied inter-governmental tax immunity beyond its legitimate scope.

THE ARGUMENT

Kern-Limerick is not controlling precedent and refutes the argument of the United States that the contractors in question are procurement agents of the United States.

In an effort to extend implied governmental tax immunity to admittedly private corporations conducting independent business activities, primarily in the form of research and development services for the DOE, the United States has contracted for so-called "advance funding" of its contractual obligations to these private corporations. Based on this contractual arrangement, United States contends that the court below erroneously concluded that this was only a means utilized by the United States to discharge its obligations under the contract to reimburse these private corporations for services rendered by them pursuant to the contracts. Rather, the United States

argues that the court below should have concluded that the advance funding arrangement converted these independent contractors into procurement agents of the United States. It then argues that the agency principle established in *Kern-Limerick* controls this case.

The basic fallacy of this position of the United States is that the source of funds for the payment of obligations or activities does not control whose obligations are being discharged or who is conducting the activities. For example, if X contracts with Y to build a building for X, and advances funds to Y to be used to construct the building, X does not become either the builder of the building or the one liable to those furnishing supplies or services to the builder. Furthermore, if state A imposes a gross receipts tax on the gross receipts of those engaged in the construction business, this tax is not imposed on Y as an agent of X because the receipts of Y are traceable to the funds of X by advanced payments, lines of credit or otherwise.

As the foregoing example illustrates, much more than advance payments, however effectuated, is required to convert the contractors in question to procurement agents of the United States. What is required, as found by this Court in *Kern-Limerick*, is that the person doing the purchasing must be able to demonstrate the following:

1. He has authority to and is acting as a purchasing agent of the United States in accordance with United States' procurement.

2. The United States is disclosed as the purchaser on the purchase order or other purchase document.

3. Title to the goods pass directly to the United States.

4. The purchasing agent assumes no liability to the seller as a result of the purchase.

The United States does not contest the foregoing in its discussion of *Kern-Limerick* (App. Br., pp. 12-13, 29). Furthermore, in arguing that *Kern-Limerick* is controlling (App. Br., p. 13), the United States does not rely on the facts held controlling in *Kern-Limerick*. Rather, as summarized on page 20 of its brief, it relies on the following facts:

1. Title passes directly to the government from the vendors;

2. Risk of loss is directly on the government;

3. The government has control over the disposition of the property and approval of management procedures employed by each contractor;

4. The advance funding arrangement.

On page four of its brief, the United States admits:

1. Under the advance funding procedure, *all contract costs are paid by the contractors* on drafts executed by the contractors.

2. Only obligations that are *"properly incurred"* by the contractors *are treated as* DOE liabilities.

Kern-Limerick stands only for the proposition that "the State may not impose a tax the legal incidence of which falls upon the federal government." *United States v. County of Fresno*, 429 U. S. 452, 459-460, n. 7 (1977). This is not the case here.

It is further noted that *Kern-Limerick* involved only one-time construction contracts while here the contracts pertain to the operation and management of complex facilities on a continuing basis. Also, in *Kern-Limerick*, the contractors were bound by the procurement requirements imposed by federal statute. Here there are no such requirements.

The controlling fact, as amplified by the brief of New Mexico, is that the contracts in question do not give the contractors the status of procurement agents of the United States nor could they do so in regard to the services directly performed by the contractors unless the contractors were, in fact and law, instrumentalities of the United States, which admittedly they are not. Furthermore, here, actual procurement was by the contractors on their own account.

As indicated on pages 31-37 of the brief of the United States, it assumes that characterization of the contractors as persons acting on behalf of the United States, and the advance funding arrangements in the contracts, without more, places the contractors in the position of procurement agents of the United States.[4] This simply does not follow. Under this reasoning, if the contracts in question recited that the sun was the moon, the United States argues that

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[4]This point is illustrated by the heading on page 21 of the United States' brief:

> "The Contracts Here Designate the Contractors as Procurement Agents of the United States Empowered to Disburse Funds belonging to the United States."

Absent from this heading is an assertion that the contractors are, in fact and law, disbursement agents of the United States. In fact, the United States concededly has stopped short of designating the contractor as agent (App. Br., p. 183; R. III).

this must be accepted as a fact. *Kern-Limerick* requires more than recitals to establish an agency relationship. *Kern-Limerick* required contract performance to conform to a true procurement agency relationship in accordance with express contractual provisions which spelled out this relationship.

As noted in *Kern-Limerick*:

> "The stipulation of facts shows in detail the course of business under this contract in the purchase of supplies and the form of this purchase. Both conform to the language of the contract in requiring specific Government approval to the purchasing agent for each request for bid and each purchase. Under these circumstances, it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction." (347 U. S. 110 at 120-121)

Thus, the United States' reliance on *Kern-Limerick* and advanced funding is misplaced.[5]

Boyd and the cases cited therein control disposition of this case wherein it was held that implied inter-governmental tax immunity is limited to taxes, the legal incidences of which are imposed on agencies or instrumentalities of the United States government.

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[5]In regard to the position of the United States, it is interesting to note that it admits that the management fees in question, although subject to advanced funding, are clearly taxable by New Mexico. We fail to see how these fees are any more or less the gross receipts of the contractors than the receipts the contractors receive for payment of the salaries of their employees, or for that matter for equipment used by their employees.

It is here undisputed that the legal incidence of both the New Mexico gross receipts and compensating use tax is on the contractors (App. Br., p. 25). Nor is there any question as to the validity of these taxes as applied to the contractors in question unless they have the status of agents or instrumentalities of the United States in regard to the gross receipts in question. This Court in *Boyd*, under facts not distinguishable from the facts here, held that Atomic Energy Commission management and construction contractors were liable for the use tax for tangible personal property which was used to fulfill their obligations under Atomic Energy Commission contracts. In an effort to have the use tax declared invalid, the government argued that the contractors were agents of the United States in rendering services for the A. E. C. The Court rejected this argument by noting:

> "The help of these companies was not sought merely to supply skilled manpower for employment by the United States and it is not argued that Carbide's 12,000 men have somehow become employees of the Commission rather than of Carbide. See *Powell v. United States Cartridge Co.*, 339 U. S. 497; *Mahoney v. United States*, 216 F. Supp. 523 (D. C. E. D. Tenn.). Of course there are governmental directives and instructions which must be obeyed, for the Commission decides the uses of and needs for fissionable material; and, of course, in the sensitive area of atomic energy operations the Commission's controls are subject to modification and change in the light of technical and other developments. But Carbide and Ferguson brought to the Oak Ridge operation both skill and judgment the United States needed and did not have and there is substantial room for the exercise of both, within and without the broad directives issued by the Commission. Should the Commission intend to build or operate the plant with its own servants and em-

> ployees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that Carbide and Ferguson, both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity. (378 U. S. 47-48; footnote omitted)

Boyd is not distinguishable. Here, the contractors have received gross receipts for the construction, operation and management of atomic energy facilities. They are no more agencies or instrumentalities of the United States than the *Boyd* contractors. This is particularly true in regard to the gross receipts the contractors receive for the services rendered by their own employees which were disassociated from transactions with third parties. It is also true in regard to the gross receipts they received as reimbursements for expenditures to third parties, since the contractors were not procurement agents of the United States within the purview of *Kern-Limerick* because they furnished and purchased goods and services on their own account.

Any doubt about *Boyd* as precedent here is removed by the cases relied upon in *Boyd*, particularly *Alabama v. King & Boozer, supra.* In *Boozer*, the court upheld a retail sales tax on contractors as purchasers of tangible personal property inasmuch as the legal incidence of the tax was on the contractors and not the United States and inasmuch as the contractors were not agencies or instrumentalities of the United States. To like effect is *Curry v. United States*, 314 U. S. 14 (1941), *Esso, supra* and *Muskegon, supra.* The controlling question in each of these cases was whether the legal incidence of the tax was

on the United States. A determination of whether the contractors were agencies or instrumentalities of the United States was relevant only for this purpose. The same is also true in regard to *Kern-Limerick*.

Boyd also lays to rest the significance here of *United States v. Livingston*, 179 F. Supp. 9 (1959), aff'd per curiam, 364 U. S. 281 (1960). *Boyd* limited this Court's affirmance of *Livingston* to its peculiar factual underpinnings which are not relevant here. Unlike *Livingston*, there is here no claim that neither the contractors nor their controlling parent corporations received no benefit or commercial advantage as a result of the contracts in question.

In sum, properly construed in light of the facts of this case, *Boyd*, and not *Kern-Limerick*, is dispositive of this case.

There is no valid reason why the judicial doctrine of implied governmental tax immunity should be extended to embrace the activities of private corporations which conduct proprietary activities on behalf of governmental agencies unless such private corporations are agencies and instrumentalities of the United States government.

The United States has cited no policy reason and the court below found no reason why the doctrine of implied governmental immunity should extend to the private corporations in question. Admittedly, the taxes in question are non-discriminatory and are directly imposed on private corporations as a result of their own commercial activities in the state of New Mexico. There is no claim here by the United States that these taxes unduly interfere

with functions of the United States Government in carrying out its atomic research and development programs. The fact that the taxes in question do not do so, at least in the eyes of Congress, is exemplified by its repeal of Section 9 (b) of the Atomic Energy Act by the Congress.[6] Absent such interference, within the purview of the doctrine of implied governmental tax immunity first enunciated in *McCullough v. Maryland*, 17 U. S. (4 Wheat.) 316 (1819) there is no valid basis for application of the doctrine of implied inter-governmental tax immunity. This does not mean that undue interference may not be implied where state taxes are imposed on the possessions, institutions and activities of the federal government itself. It does mean that such immunity should not be implied in circumstances where state taxes are not so imposed.

While acknowledging that the contractors in question are not agencies or instrumentalities of the United States within the purview of *McCullough v. Maryland, supra*, or otherwise, the United States is here attempting to extend the agency or instrumentality doctrine to include an admittedly implied limited agency relationship in reference to particular activities and then argue that state taxes which are imposed on these activities constitute taxes on a federal agency or instrumentality. This conclusion does not follow. Furthermore, no such extension of implied governmental tax immunity is justified. It adds uncertainty and generates litigation in the implied tax immunity area, which is costly to the government and the

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[6]For an explanation of the repeal of Section 9 (b) of the Atomic Energy Act, see Footnote 9 in the brief of the United States, pages 26-27

states. Furthermore, it is subject to contractual penmanship and places the contractual form over economic and business substance.

For the above stated reasons, it is respectfully submitted that implied inter-governmental tax immunity should not be extended to private corporations which are not assimilated into the structure of United States Government as its agencies or instrumentalities.

CONCLUSION

This Court should affirm the judgment of the court below. In so doing, it is respectfully requested to affirm the proposition that only those taxpayers that constitute federal agencies and instrumentalities, in fact and law, are to be accorded implied immunity from state taxation. This affirmation is simply the reflection of the notion that private corporations carrying on commercial activities with the federal government cannot, by inference and contractual manipulation, stand in the shoes of the United States for constitutional tax immunity purposes. In no event should the Court extend *Kern-Limerick* to the distinguishable facts and circumstances of this case.

Respectfully submitted,

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